U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 09Apr2002

CASE NO.: 2001-LHC-1713

OWCP NO.: 07-155911

IN THE MATTER OF

WALLACE BOUDREAUX,
Claimant

v.

FMC CORP.,
Employer

and

TRAVELERS INSURANCE CO.,
Carrier

APPEARANCES:

Warren Perrin, Esq.
On behalf of the Claimant

J. Louis Gibbens, Esq.
On behalf of the Employer and Carrier

Before: CLEMENT J. KENNINGTON
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by Wallace Boudreaux, (Claimant), against FMC Corp.,

(Employer), and Travelers Insurance Co., (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before me on January 29, 2002, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post hearing briefs in support of their positions. Claimant testified and introduced thirteen exhibits, all of which were admitted into evidence (CX 2-14) including: discovery responses; Claimant's work restrictions; Employer's First Report of Injury, various affidavits, various correspondence; and a summary of medical bills.[1] Claimant also presented testimony from himself, and co-workers, Jesse Nathan Cooper and Jared Herbert.

Employer introduced seventeen exhibits, which were received at the hearing (EX 1-3, 5-18), including: a statement by Gene Glass, a co-worker of Claimant's at the gym; depositions from Drs. May and Barczyk; Claimant's claim for compensation; Claimant's income tax returns, various medical records, the deposition of Kim Sandrock, the insurance adjuster assigned to Claimant's file, and video surveillance tapes.

Claimant filed a Motion in *Limine*, on the eve of trial, seeking to exclude video surveillance on the grounds that such was not timely turned over pursuant to a discovery request. Employer filed a response. On October 16, 2001, Claimant had requested copies of "photographs, motion pictures or videos of claimant taken after the accident." (CX 2) By way of interrogatory, Claimant also inquired into the use of any video observation. (CX 2). Employer responded that it did have a record of observations but it wanted to retain the surveillance until Claimant's deposition could be taken. (EX 2). *See* Fed R. Civ. Proc. 26(a)(3)(2002)(providing for pretrial disclosure of certain information regarding evidence that will be used at trial unless used "solely for impeachment purposes."); *Chaisson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 517 (5th Cir. 1993)(stating that regardless of its impeachment value, video surveillance must be turned over pursuant to discovery if it has substantive value). Withholding video surveillance until a party's deposition can be taken preserves both the impeachment value of video surveillance and it subsequent disclosure fulfills the discovery requirements when the tape also has substantive value. *See e.g. Wolford v. JoEllen Smith Psychiatric Hospital*, 693 So.2d 1164, n.4 (La. 1997)(recognizing cases where courts permit withholding of video surveillance until after the party's deposition).

The video surveillance was conducted on February 17, 2000, and February 28, 2000. Claimant's deposition was held on July 12, 2001, but the parties did not submit the deposition as an exhibit. (Tr. 7). Accordingly, Claimant made a discovery request for video surveillance, which the Employer refused on December 4, 2001, stating that he wanted to use the video surveillance at Claimant's deposition before turning the tapes over. In fact, Employer had possession of the tapes well over a year prior to Claimant's

[1] References to the transcript and exhibits are as follows: hearing transcript-Tr.___; Claimant's exhibits- CX___, p.___; Employer's exhibits-EX___, p.___.

deposition. The tapes, which depict Claimant's physical activity, are clearly substantive in nature. Therefore, I find that Employer should have turned the video tapes over pursuant to discovery and because they were not, I find it appropriate to exclude them from evidence.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witnesses' demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated, and I find:

1. An employer/employee relationship existed during the time period the alleged accident/injury occurred;

2. Employer timely controverted the claim;

3. An informal conference was held on May 18, 2000;

4. Claimant's average weekly wage at the time of the injury was $1,333.56 per week;

II. ISSUES

The following unresolved issues were presented by the parties:

1. Whether the injury occurred in the course and scope of employment;

2. Whether Claimant has an impairment and loss of wage earning capacity attributable to the alleged employment related injury/accident;

3. Medical benefits;

4. Section 49 Penalties; and

5. Attorney's fees and interest.

III. STATEMENT OF THE CASE

A. Chronology

Prior to working for Employer as a Well Head Service Technician, Claimant worked for Laydown Service Inc. / Garber Industries from 1980-1984 as a lay down operator. (Tr. 36-37; EX 8, p.9). From 1984 to 1987 Claimant performed well head service work for Ingram Cactus Wellheads, Inc. (Tr. 36; EX 8, p. 9). After working for Ingram Cactus, Claimant worked in the Lafayette Parish Sheriff's Office as a Correctional Officer/Intake, Booking and Bonding Shift Coordinator from 1989-1996. (EX 8 , p. 9). About half of this time was spent as a hospital security guard at University Medical Center. (Tr. 36). Claimant also worked as a dispatcher for Primer Casing Crews. Claimant left that job to work for Employer in May 1997. (Tr. 37).

Before undertaking off-shore employment, some of the above employers required pre-employment physical testing. (Tr. 41). Claimant passed the physical tests for both Primer Casing Crews and for Employer. (Tr. 41-42; EX 13, p. 8). Claimant, however, did have prior troubles with his back. (Tr. 65). While working for Ingram Cactus in the late 1980s, Claimant had his back x-rayed, which came back as a "Class 4 back," and Ingram refused to rehire him for that reason once he was laid-off. (Tr. 75). The majority of Claimant's back problems, however, originated from his work at the Sheriff's Office. (Tr. 65). In July 1992, Claimant reported pain in his upper back and neck to Dr. Bryant, a chiropractor, and an examination revealed a spinal subluxation. (EX 15, p. 2). Claimant received numerous spinal adjustments in July and August of 1992. *Id*. at 2-3. On August 24, 1992, Claimant related that he suffered from pain in the low back and legs. *Id*. at 4. On September 3, 1992, Claimant's pain had apparently subsided, but Dr. Bryant still recommended spinal adjustments to help reduce Claimant's scoliosis. *Id*. On September 25, and 28, 1992, Claimant reported recurrent pain in his low back and Dr. Bryant recommended weekly treatments. *Id*. On December 15, 1992, Dr. Bryant again noted subluxation requiring first, third and fourth thoracic adjustments. *Id*.

Also while working for the Sheriff's Office, Claimant was struck by a car in pursuit of a suspect. (Tr. 65). Claimant underwent treatment with Dr. Bryant on April 16, 1995, and his chief complaint was low back and left side pain with restricted lumbar dorsal rom's. (Tr. 65; EX 15, p. 7). Orthopedic testing revealed a lumbar sprain/strain syndrome with myospasm and restricted rom's. *Id*. Claimant also related on April 25, 1995, that he had been experiencing numbness in both hands and both small fingers over the past year. (EX 15, p. 11). Dr. Bryant treated Claimant for active symptoms until June 12, 1995, and discharged Claimant on July 14, 1995. *Id*. at 20.

Claimant alleges that he was injured in July 1999 when Don Fontenot, the Vastar company representative, requested that Claimant dismantle a walkway to further the task of "skidding the rig." (Tr. 44). At the time Claimant was removing the grating of the walkway, he had worked about eighteen hours,

about midway through a forty-two hour period where he only had two hours of rest. (Tr. 47). Claimant's request for assistance was denied because there were no extra workers to help him. (Tr. 48).

While removing a piece of grating about twenty feet long by three feet wide Claimant allegedly felt like he pulled a muscle, but the sensation was more "popping" and "radiant, it was deep in the hip." (Tr. 47-48, 50). Claimant stopped work temporarily to stretch, walk around and he took some Aleve before resuming his work duties. (Tr. 50-51). Claimant related the fact of his injury to co-workers Randy Jenkins, Jesse Cooper and Jarred Herbert. (Tr. 51). Claimant completed his hitch although he stated that it was a "little awkward." (Tr. 52). When Claimant returned home from his shift, he contacted Bobby Hinson, his supervisor, on July 27 or 28, 1999, to report that he had hurt his back. (Tr. 52). Rather than having Claimant fill an accident report, Mr. Hinston told him to get the problem fixed, which Claimant did through his private insurance. (Tr. 52-53).

On August 5, 1999, Claimant related to Dr. May, a family practitioner, at the American Back Institute that he had a one-and-a-half year history of back pain for no apparent reason, and had the same symptoms in 1995. (EX 12, p. 2, 14). Dr. May prescribed 20-25 sessions of VAX-D therapy, 20-25 electrical stimulation sessions and 20-25 cold/hot packs with a lumbar brace. (Tr. 53; EX 12, p. 5).

On August 11, 1999, Claimant filled out an application for short term disability benefits due to pain in the lower back and hip area. (EX 8, p. 3). Claimant related that his last day of work was August 4, 1999, and that he expected to be able to return to work on September 3, 1999. *Id*. When asked to explain whether his condition was a job related injury, Claimant inserted a question mark and stated that on July 22, 1999, he woke up with a "tense" back, took some Aleve, and went back to bed. *Id*. Claimant then stated "[t]here was no accident while working." *Id*.

After twenty-one treatments of VAX-D Claimant felt "quite a bit better" and asked Dr. May to write a work release. (Tr. 54). On October 10, 1999, Dr. May released Claimant to return to work at full duty. (EX 12, p. 11). When Claimant brought the work release to Bobby Hinson, however, he was told that the release was not good enough and Employer needed to know if there were any restrictions. (Tr. 54-55). Claimant went back to Dr. May, related his concerns about returning to work at full duty, and on October 14, 1999, Dr. May issued new work restrictions that would prohibit Claimant from working longer than ten hours a day, lifting greater than fifty pounds, taking extended "rough" boat rides greater than 1-2 hours, and restricted Claimant to the use of a supportive mattress. (CX 3; EX 5, p. 13; EX 12, p. 13). Employer responded that they had no job available to fit those restrictions, and Claimant could either resign or be terminated. (Tr. 55). Thereafter, Claimant sought legal assistance.

On December 10, 1999, a representative of Employer authored a letter to Claimant relating that Employer offered to seek employment for Claimant outside of the Lafayette area but Claimant declined that offer. (EX 8, p.1). On December 20, 1999, Employer filed its First Report of Injury. (CX 4).

On December 23, 1999, Kim Sandrock, an adjuster for Carrier interviewed Claimant by phone, in the presence of his attorney, to obtain a statement of the alleged accident/injury. (EX 17). Meanwhile, Claimant found self employed working seventy-five hours per week marketing nutritional products. (Tr. 134). Claimant also receives ten dollar an hour for conducting personal training, and the owner of the gym sometimes will pay him for maintaining the equipment. (Tr. 135).

After a few months without VAX-D treatments, Claimant's back began to bother him again and he sought treatment with Dr. Barczyk, a chiropractor, on January 10, 2000, complaining of pain on his lower back and left side. (Tr. 57; EX 16, p. 3). Acknowledging that he had prior back problems, Claimant stated that his current pain was of a completely different variety. (EX 16, p. 6).

On February 8, 2000, Dr. Barczyk issued a report stating that Claimant's lumbar motion was unrestricted but he felt pain on flexion and a tingling sensation in his legs. *Id*. at 12. Br. Barczyk reviewed x-ray films which revealed an intact lumbar curve, but degenerative changes at L5-S1 and L2-L3. *Id*. The A/P view showed pelvic un-leveling and a moderate left convexity of the lumbar spine. *Id*. Dr. Barczyk diagnosed chronic sacroiliac sprain/strain and sacral segmental dysfunction. *Id*. Although Dr. Barczyk recommended a treatment of spinal manipulative therapy and electric muscle stimulation, his prognosis for recovery was guarded.[2] *Id*. at 13. Dr. Barczyk did not recommend heavy lifting, but stated that as long as lifting did not affect his back then Claimant could work. (Tr. 57-58).

On March 14, 2000, Claimant filed a claim for compensation for his injury which he alleged occurred on July 22, 1999. (EX 7, p.1). On April 11, 2000, Claimant's attorney requested that Carrier authorize treatment with orthopaedist Dr. Blanda or Cobb. (CX 13). Carrier refused this request.

On October 11, 2001, Dr. Bernard, an orthopedic surgeon, conducted an "independent evaluation" of Claimant on the request of Employer's attorney. (EX 11, p. 1). Dr. Bernard took five x-rays of the lumbar spine which revealed that Claimant had five typical lumbar vertebrae with mild idiopathic variety of lumbar scoliosis with convexity to the left, bilateral spondylitic defect at L5 with a very mild slip at L5-S1. *Id*. Both the scoliosis and spondylolysis were developmental in nature. *Id*. Associated with the mild scoliosis was mild spurring and degenerative changes throughout the lumbar spine. *Id*. On November 7, 2001, Dr. Bernard reviewed an MRI scan taken on October 31, 2001, noted that there was no evidence of herniation or stenosis, and Dr. Bernard opined that the results were not what he would have expected from an injury. *Id*. at 5. Dr. Bernard stated that Claimant could return to work without restrictions. *Id*.

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[2] At his deposition Dr. Barczyk rated Claimant's future prognosis as fair, but stated that because Claimant was two years post-injury and due to the fact that Claimant has degenerative conditions in his spine, his condition is most likely permanent. (EX 16, p. 13-14).

B. Claimant's Testimony

Claimant, a forty-year old high school graduate with two years of college education, testified that he was a Well Head Service Technician for Employer, a position classified as heavy labor. (Tr. 35-36). Prior to the alleged accident, he had worked for Employer for a little over two years. (Tr. 35). As a Well Head Service Technician Claimant worked on seven different platforms doing a number of different jobs. (Tr. 37). Claimant would sometimes repair valves, run casings, or work over a well. (Tr. 37). Over the two years he worked in the oil fields, he became well acquainted with many workers. (Tr. 37-38). As the only representative of Employer, Claimant took his orders from numerous supervisors representing different companies. (Tr. 38-40). When the alleged injury occurred, Claimant testified that he was on the Sundowner - 8 rig, making Claimant's supervisors Mickey Fruge and Louis Gautreaux, who worked opposite hitches. (Tr. 39-40). At the time, however, Mickey Fruge was on vacation and the contact person was Don Fontenot. (Tr. 40). Claimant testified concerning his job duties:

> FMC expected me to take care of everything that FMC needed done in the field. If I needed parts ordered, if I needed anything, well heads to come out to be repaired, to be reconditioned, if I was going to recondition the equipment in the field, I had to go about doing everything as a one-man band; basically to run all of FMC functions in the field. . . .
>
> There was a lot of heavy lifting. For instance a casing hanger can go up to ninety pounds. This is something that had to be wrapped around the casing, latched, and set into place. The only way to do that is by hand. I always did have help doing that, you know, maybe two or three people.
>
> But the trowel cutter, the saw the Mr. Cooper was taking about, was a very heavy piece of equipment. Getting it rigged up, holding it in place while another man gets the chain wrapped around it, it's a lot of heavy work, a lot of heavy lifting.
>
> Also my tool bag weighed approximately 60 to 70 pounds. And I was constantly walking flights of stairs, with the tools, you know, going up and down.

(Tr. 41-42).

Claimant further testified that no employer allowed its employees to work more that eighteen hours at a time. (Tr. 43). Claimant had worked more than eighteen hours when his alleged injury occurred because Mr. Gautreaux denied Claimant another hand when every employee of the Sundowner 8 rig was working eighteen hour shifts and another person could not be brought out from Venice timely. (Tr. 43-44). Claimant reported that when he asked Mr. Gautreaux for another hand, Mr. Gautreaux responded: "Come to the office. I've got some tissues, you can wipe your eyes." (Tr. 49-50).

Don Fontenot, the Vastar company representative, requested that Claimant dismantle a walkway to further the task of "skidding the rig." (Tr. 44). At the time Claimant was removing the grating of the walkway he had worked about eighteen hours, about midway through a forty-two hour period where he only had two hours of rest. (Tr. 47).

Claimant testified that he injured his back while removing a piece of grating about twenty feet long by three feet wide. (Tr. 47-48). After he had taken the fasteners off the grating, he had to "pick up on the front end and push on the bottom to get it unstuck from underneath the ledge and pull." (Tr. 48). Claimant felt like he pulled a muscle, but the sensations was more "popping" and "radiant, it was deep in the hip." (Tr. 50). Claimant further testified that straining and pulling muscles was something that happened everyday and that he did not pay much attention to the occurrence when it happened. (Tr. 50). Claimant, however, had never felt this kind of pain before, so he stopped his work temporarily to take some Aleve. (Tr. 50). Claimant stretched, walked around a few minutes and resumed working. (Tr. 51). Claimant related the fact of his injury to Randy Jenkins, Jesse Cooper and Jarred Herbert. (Tr. 51). Claimant did have regular day-to-day telephone contact with Employer but never mentioned the injury. (Tr. 74). Claimant completed his hitch although he stated that it was a "little awkward." (Tr. 52).

There was no representative of Employer with whom Claimant could have filed a report of injury with, although he could have spoken to personnel from other companies. (Tr. 52). When Claimant returned home from his shift, he contacted Bobby Hinson, his supervisor, on July 27 or 28, 1999, to report that he had hurt his back. (Tr. 52). Rather than having Claimant fill an accident report, Mr. Hinston told him to get the problem fixed, which Claimant did through his private insurance. (Tr. 52-53). When Claimant broached the subject of compensation benefits with Bobby Hinston, he was told to file for disability benefits. (Tr. 59-60).

Claimant further testified that he pursued weight training prior to his accident because after his mother died of diabetes he felt as if he needed to be in better shape. (Tr. 56). After his accident Claimant discussed his weight training program with Dr. Barczyk, who related that everything Claimant was doing was okay and the exercises would probably strengthen his back. (Tr. 57). Claimant maintained a complete body work-out routine. (Tr. 64). No doctor had ever placed a restriction on him in regards to his work-out routine, but Dr. Barzcyk did tell him to stop whenever he feels pain. (Tr. 64). Claimant testified that he squats 225 pounds, and dead-lifts 175 to 185 pounds. (Tr. 69-70). Claimant also utilized a Swiss Ball for stomach crunches and hyper-extensions of the back. (Tr. 113). Claimant bench presses 225 pounds with a bar and presses two seventy pound dumbbells. (Tr. 116). Weights Claimant uses for a chest workout range from thirty to 245 pounds. (Tr. 118). Claimant exercises his back by doing 170-180 pound pull-downs among seven or eight other strenuous activities focusing on the back muscles. (Tr. 120-122). Claimant also curls 45 pound dumbbells in each hand. (Tr. 125). Claimant stated that these exercises do not hurt his back and when he feels as if his back is becoming irritated he quits for the day. (Tr. 129).

After his workplace accident, Claimant stated that he is restricted by being unable to run, ride a bicycle and doing simple things, such as changing a tire. (Tr. 66). Claimant also requested that Dr. Barczyk give authorization to return to work in the sheriff's office, but Dr. Barczyk did not think that was a good idea. (Tr. 58). Although he has requested to return to work, Claimant alleged that Employer refused to allow him to return (Tr. 35). Regarding the issue of relocation, Claimant testified that he declined the offer to relocate because he wanted some advance warning about where he would be going. (Tr. 107). Claimant interpreted to offer by Employer to mean that he would have to leave immediately and would not have time to let his family know where he was going. (Tr. 107).

On cross examination, Claimant admitted that he described the injury as a twitch in his back when making a statement to the insurance adjuster. (Tr. 77). Claimant had also related that it did not hurt much at the time and that he did not report the injury to anyone until the next day. (Tr. 78). Claimant also admitted that when he spoke to Mr. Hinston after his shift was over he related that he thought he strained his back but did not think it was an accident. (Tr. 83). Additionally, Claimant admitted that he told Dr. May that he had experienced intermittent low-back pain for about a year and a half without apparent or specific reason. (Tr. 86-87). Claimant explained this contradictory statement on the basis that he had a different definition for the word "accident." (Tr. 87). Specifically, Claimant associated the word "accident" with a serious injury necessitating an air-lift for medical treatment, not with a self-inflicted impairment due to lifting. (Tr. 87-88).

Also, when Claimant spoke with the insurance adjuster, he reported that he never had a previous work-related accident or injury, and explained his statement at trial by stating that he interpreted the question as only applying to Employer and not any past job he may have held. (Tr. 89-90). Claimant admitted to having chiropractor treatments before beginning work for Employer. (Tr. 92). Furthermore, Claimant told the insurance adjuster that he did not have any subsequent injuries to his back after the July 1999 incident, but Claimant admitted to pulling his hip while disconnecting a trailer in August of 1999. (Tr. 95-96; EX 12, p. 27). Even prior to Employer hiring Claimant, he misrepresented facts on his pre-employment physical testing by stating that he had never had any problems with his back, hips or joints. (Tr. 108; EX 13, p. 5). Claimant explained the omission on the fact that he interpreted the form as asking whether he was having pain now - not if he ever had pain - despite the instructions to check the box if he had any of the problems within the last five years. (Tr. 109; EX 13, p. 5)

Claimant also related that Dr. May returned him to work at "full duty" a statement which Claimant understood to mean "without restrictions," and it was not until Claimant returned to Dr. May, per Mr. Hinson's request, that Dr. May issued any restrictions. (Tr. 101). Claimant also related that he suggested the ten hour limitation, and admitted that he is violating his restrictions every day at the gym. (Tr. 102).

C. Claimant Witness, Jesse Nathan Cooper

Mr. Cooper was employed by H&P as a derrick man on rig 108. (Tr. 19-20). Mr. Cooper knew Claimant because he was the Employer's hand in that particular oil field. (Tr. 20). Mr. Cooper had no

personal relationship with Claimant, was subpoenaed to come to trial on his only contact was with Claimant during the corse and scope of his duties. (Tr. 20).

Mr. Cooper testified that in July 1999, he helped Claimant handle a saw to cut twenty-inch casing that weighed about 133 pounds per foot. (Tr. 21-22). Mr. Cooper observed that Claimant did not seem to be as active and did not appear "normal." (Tr. 22). When Mr. Cooper inquired, Claimant responded that he had hurt his back on another platform. (Tr. 23). Mr. Cooper could not remember the precise date of the conversation. (Tr. 24). He did recall that it was at the end of a hitch, and stated that if Claimant had worked the past forty or fifty hours with little rest then he could attribute Claimant's behavior to physical fatigue. (Tr. 25). Nearly a year later, Mr. Cooper signed an affidavit prepared by Claimant's counsel. (Tr. 23-24). Mr. Cooper was never contacted by Employer or Carrier. (Tr. 23).

D. Claimant Witness, Jared Herbert

Mr. Herbert was an employee of Sundowner Nabors who met Claimant while working on the rigs and worked with Claimant on a frequent basis. (Tr. 27). While he was "skidding a rig" Mr. Herbert saw Claimant walking up the stairs and stated that Claimant told him that he had pulled a muscle in his back and was going to get some medicine. (Tr. 27-28). Mr. Herbert signed an affidavit sent by Claimant's counsel but has never had any contact with Employer or Carrier. (Tr. 28).

Mr. Herbert did not work on the same platform as Mr. Cooper. (Tr. 29). Mr. Herbert also testified that he could not remember the time of day, but he opined that the accident had just happened and that Claimant was going to retrieve some medicine from his bag. (Tr. 29-30). Mr. Herbert did not witness the accident and was unaware of anyone that did. (Tr. 30). Mr. Herbert did not remember whether it was the last day of the hitch or whether Claimant resumed his duties for the rest of the shift. (Tr. 31). Although Mr. Herbert stated that the conversation took place on July 21, 1999, he testified that he could not remember the precise date, and related that he probably got that information from another source. (Tr. 33-34).

E. Exhibits

(1) Medical Records From Dr. Donald Bryant

In July 1992, Claimant reported pain in his upper back and neck to Dr. Bryant, a chiropractor, and an examination revealed a spinal subluxation. (EX 15, p. 2). Claimant received spinal adjustments on July

2, 3, 6, 8, 13, 15, 17, 22, 23 and 31. *Id*. at 2-3. Spinal adjustments continued into August, and on August 24, 1992, Claimant related that he suffered from pain in the low back and legs. *Id*. at 4. On September 3, 1992, Claimant's pain had apparently subsided, but Dr. Bryant still recommended spinal adjustments to help reduce Claimant's scoliosis. *Id*. On September 25, and 28, 1992, however, Claimant reported recurrent pain in his low back and Dr. Bryant recommended weekly treatments. *Id*. On December 15, 1992, Dr. Bryant noted subluxation requiring first, third and fourth thoracic adjustments. *Id*.

On April 16, 1995, Claimant returned to Dr. Bryant after restraining a patient at University Medical Hospital. *Id*. at 7. Claimant complained about low back and left side pain with restricted lumbar dorsal rom's. *Id*. A x-ray did not reveal any fracture or dislocation and orthopedic testing revealed a lumbar sprain/strain syndrome with myospasm and restricted roms. *Id*. Claimant also revealed on April 25, 1995, that over the past year he had been experiencing numbness in both hands and both small fingers. *Id*. at 11. Dr. Bryant treated Claimant for active symptoms until June 12, 1995, and discharged Claimant on July 14, 1995. *Id*. at 20.

(2) Medical Records From Occupational Medicine Clinic

On May 20, 1997, Claimant filled out a "baseline health history questionnaire" for Employer on which he indicated that he didn't have any musculo/skeletal pain during the past five years. (EX 13, p. 5). Claimant completed the questionnaire and physical examination with "no defects." *Id*. at 8.

(3) Medical Records from the American Back Institute

On August 5, 1999, Claimant related to Dr. May, a family practitioner, at the American Back Institute that he had a one-and-a-half year history of back pain for no apparent reason, and had the same symptoms in 1995. (EX 12, p. 2, 14). Dr. May diagnosed degenerative disc disease and degenerative joint disease. *Id*. at 3. Dr. May prescribed 20-25 sessions of VAX-D therapy, 20-25 electrical stimulation sessions and 20-25 cold/hot packs with a lumbar brace. *Id*. at 5. Claimant also received light duty work restrictions of no lifting greater than ten pounds, no repetitive bending or climbing, and no work shifts greater than six hours a day for the duration of his treatment. *Id*. at 7, 9. On September 3, 1999, Claimant remarked that on a scale of 0-10, he classified his pain as level "one." *Id*. at 21. Progress notes on September 23, 1999, related that he felt good but had severe pain intermittently in his left hip. *Id*. at 10. Nevertheless, on October 10, 1999, Dr. May released Claimant to return to work at full duty. *Id*. at 11. On October 14, 1999, however, Dr. May redacted that return to work slip and issued new work restrictions that would prohibit Claimant from working longer than ten hours a day, lifting greater than fifty pounds, taking extended "rough" boat rides greater than 1-2 hours, and restricted Claimant to using a supportive mattress. *Id*. at 13.

(4) Deposition of Dr. May

Employer noticed the deposition of Dr. May on October 9, 2001, concerning his treatment of Claimant at the American Back Institute. (EX 5). Dr. May related that Claimant did not explain his statement that he had back pain for about a year-and-a-half prior to his treatment, and Claimant did not give Dr. May a particular event that caused his immediate problem. *Id*. at 8. Dr. May did state, however, that someone with chronic back pain will have exacerbations and remissions of symptoms. *Id*. at 24. Dr. May also related that a patient with degenerative back disease , who engaged in heavy manual labor, first gets muscle fatigue, and as those muscles fatigue, the muscles of the supporting tissue help out to relieve pressure on the spine. *Id*. at 27. As those muscles become fatigued, the discs in the spine end up taking a greater weight and the pressure can lead to acceleration of the degenerative process. *Id*. Sciatica, which is what Dr. May diagnosed for Claimant, occurs when the disc degenerates to such an extent that the nerve root exits. *Id*.

After Claimant's VAX-D treatment, Claimant came for a follow-up on September 23, 1999, and related to Dr. May that he could not return to work unless it was at full duty. *Id*. at 11. Claimant was feeling much improved but still had some intermittent pain in his left hip. *Id*. Dr. May released Claimant to return to full duty on October 10, 1999, but four days later, he was presented with a chart to write a note stipulating restrictions for work. *Id*. at 11-12. Dr. May reflected that Claimant came to visit him voicing concern about going back to work, specifically relating that the boat ride to the platform was rough and jarring, the mattresses Employer provided were soft and not supportive, and relating concerns about the long work shifts. *Id* at 13. Dr. May had no solid reason for changing Claimant's work restrictions other than the fact that Claimant voiced the above concerns about his work. *Id*. at 15. Dr. May knew that Claimant did heavy work prior to returning him to full duty on October 10, 1999. *Id*. at 15. Dr. May came up with the fifty pound lifting restriction because he uses that figure for anyone who has degenerative disc disorder and is still symptomatic. *Id*. at 16. Such restriction were consistent with moderate level work. *Id*. at 19.

Regarding Claimant's exercise routine, Dr. May stated that what he was concerned with in patients with lumbar problems was dead-lifting, curls and any exercise that would place pressure on the spine. *Id*. at 21. Any exercise that isolated pressure away from the lumbar spine was not of much concern, but weight lifting could cause degenerative disc disease. *Id*. at 21, 28. If Claimant could squat or dead-lift more than fifty pounds then Claimant would be qualified for the heavy work category. *Id*. at 21.

(5) Carrier's (Kim Sandrock's) Interview with Claimant

On December 23, 1999, Kim Sandrock, an adjuster for Carrier, interviewed Claimant by telephone in the presence of his attorney. (EX 17. p.1). Claimant related to her that he was injured on July

21, 1999, on the South Pass 60 E Platform between 2:00 and 9:00 p.m. *Id*. at 3-4. Claimant related that while he was dismantling the walkway he felt a twitch in his back, "something that [he'd] felt before just not as intense as that." *Id*. at 5. Claimant also told Ms. Sandrock that he related the fact of injury to several employees on the platform, but he could not remember their names. *Id*. at 6. Claimant did not report his injury to a supervisor and when his 42 hour shift ended, he was far too tired to stop and think about what he should do. *Id*. at 6. When asked about whether he had ever had problems with his back in the past, Claimant responded: "no, uh not that I you know not that, no." *Id*. at 14.

(6) Medical Records fo Barczyk Chiropractic Group

On January 10, 2000, Claimant presented to Barczyk Chiropractic Group for pain in his lower back and left side. (EX 16, p. 3). Claimant reported the injury as work related, and stated that the accident occurred either on July 20, or July 21, 1999. *Id*. Claimant also related that he had similar symptoms prior to the alleged work-place accident. *Id*. Claimant opined, however, that his current pain was of a completely different variety. *Id*. at 6.

On February 8, 2000, Dr. Barczyk issued a report stating that Claimant's lumbar motion was unrestricted but he felt pain on flexion and Claimant reported a tingling sensation in his legs. *Id*. at 12. X-ray films, taken at the American Back Institute, revealed an intact lumbar curve, but degenerative changes at L5-S1 and L2-L3. *Id*. The A/P view showed pelvic un-leveling and a moderate left convexity of the lumbar spine. *Id*. Dr. Barczyk diagnosed chronic sacroiliac sprain/strain and sacral segmental dysfunction. *Id*. Although Dr. Barczyk recommended a treatment of spinal manipulative therapy and electric muscle stimulation, his prognosis for recovery was guarded. *Id*. at 13.

(7) Deposition of Dr. David Barczyk

Employer noticed the deposition of Dr. Barczyk on August 27, 2001. (EX 6). Dr. Barczyk related that the treatment he generally gives Claimant is manipulation for the joints, electric muscle stimulation and moist heat packs. *Id*. at 6. Dr. Barczyk could not tell whether Claimant was a maximum improvement because Claimant had already gone through several VAX-D therapy sessions which seemed to improve his condition. *Id*. at 8. Claimant's pain had returned following the VAX-D treatments, however, and through Br. Barczyk treatments, Claimant tolerance was such that he only had to receive treatments about once every six weeks. *Id*. Dr. Barczyk did opine that Claimant was better off now than when he last attended ABI for treatment. *Id*. at 12.

Dr. Barczyk related that the VAX-D treatment Claimant had received stands for vertebral axial decompression. *Id*. at 9. That treatment entailed a person lying on their stomach and a machine separates

the lumbar spine and tractions the lumbar spine out. *Id*. at 9. Dr. Barczyk's joint manipulation consisted of moving the facet joints in the spine to increase the proprioceptive areas of the joint and the mechanoreception of the joint, increasing circulation within the joint and helping to restore a little muscle tone. *Id*. at 10-11. The electrical stimulation merely reduces the spasm and aids in the manipulation. *Id*. at 11.

Dr. Barczyk rated Claimant's future prognosis as fair, but stated that because Claimant was two years post-injury, and due to the fact that Claimant has degenerative conditions in his spine, his condition is most likely permanent. *Id*. at 13-14. Dr. Barczyk did not think that it was a good idea that Claimant return to manual labor. *Id*. at 14. Dr. Barczyk was aware of Claimant's weight lifting and recommended that Claimant continue to lift weights to strengthen his back. *Id*. at 15-16. Although he did not know how much Claimant lifted, he stated that weight limits were relative to the patient and as long as Claimant was not in pain he could continue his exercise program. *Id*. at 17. Lifting weights is different from working because lifting weights takes place in a controlled environment and does not entail the twisting and bending motions common in the work place. *Id*. at 16.

Despite his exercise regimen, Dr. Barczyk stated that a fifty pound lifting restriction was proper for Claimant because lifting objects at work uses different vectors and can place a vastly different amount of stress on the spine than lifting weights in a controlled environment. *Id*. at 23-24. Dr. Barczyk would recommend against Claimant performing his job as service technician because the repetitive nature of the job would be detrimental to Claimant's back, even though Claimant could likely perform any single task effectively in isolation. *Id*. at 25.

Dr. Barczyk explained his diagnosis of sacral segmental dysfunction as a locking of the joints between L5 and the sacrum which is created by tearing ligaments in the spine and a resultant reflexogenic muscle spasm. *Id*. at 29. Because Claimant also suffers from degenerative disc disease that complicates his recovery and helps to make his condition chronic, while not an aggravating factor, degenerative disc disease would accelerate symptoms from Claimant's injury. *Id*. at 32-33.

(8) Medical Records from Iberia Orthopedic Group

On October 11, 2001, Dr. Bernard, an orthopedic surgeon, conducted an "independent evaluation" of Claimant on the request of Employer's attorney. (EX 11, p. 1). Claimant related to Dr. Bernard that he used to have pain going down his legs, but his chiropractor had nearly relieved him of that pain. *Id*. Also, Claimant reported occasional pain in his posterior left hip from his sciatic nerve. *Id*. Claimant also admitted that he had some back problems in the past, but never experienced any pain similar to that on the day of his injury. *Id*.

Dr. Bernard took five x-rays of the lumbar spine which revealed that Claimant had five typical lumbar vertebrae with mild idiopathic variety of lumbar scoliosis with convexity to the left, bilateral spondylitic defect at L5 with a mild slip at L5-S1. *Id*. Both the scoliosis and spondylolysis were developmental in nature. *Id*. Associated with the mild scoliosis was mild spurring and degenerative changes throughout the lumbar spine. *Id*.

On November 7, 2001, Dr. Bernard reviewed an MRI scan taken on October 31, 2001, and noted that Claimant had multiple level degenerative disc disease with desiccation of the disc at L2-3, L3-4, L4-5 and L5-S1. *Id*. at 5. There was no evidence of herniation or stenosis and Dr. Bernard opined that the results were not what he would have expected from an injury. *Id*. The mild spondylitic defect at L5 with a mild slip was not even recognizable on the MRI scan. *Id*. Dr. Bernard further stated that Claimant could return to work without restrictions. *Id*.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. *Voris v. Eikel*, 346 U.S. 328, 333, 74 S. Ct. 88, 98 L. Ed. 5 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F. 2d 144 (D.C. Cir. 1967). The United States Supreme Court, however, has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L. Ed. 2d 221 (1994).

A. Contentions of the Parties

Claimant asserts that he established a *prima facie* case of causation - through the testimony of Claimant and two co-workers - entitling him to temporary total disability at the maximum compensation rate from July 1999 to the present. The fact that an event occurred, or conditions existed at work that could have caused the injury, is supported by: 1) the state of Claimant's health before the accident, 2) the fact hat he worked forty-two hours before the accident engaging in heavy manual labor; 3) a contemporaneous complaint to his co-workers and supervisor about the accident; 4) his post-injury actions in seeking medical attention; 5) and the fact that Claimant made a good-faith effort to return to work with the restrictions imposed on him by his treating physician. Claimant further contends that Employer did not rebut this presumption and that the burden then shifted to Employer to show suitable alternative employment, which the Employer failed to establish at the hearing.

Additionally, Claimant argues that Employer violated Section 49 of the Act because the Employer engaged in discriminatory conduct in relation to the claim for compensation made under the Act. Furthermore, Claimant contends that Employer refused his requests to authorize medical services, thus, Claimant was excused from receiving prior authorization by Employer under Section 7, and Employer is responsible for Claimant's medical expenses.

Employer/Carrier asserts that Claimant failed to show a *prima facie* case of causation as there were no witnesses to the alleged event, the subsequent actions of Claimant do not support a finding that a traumatic injury occurred, and Claimant's treating physician only stated that it was possible that Claimant's symptoms could be due to some incident that happened. Alternatively, Employer asserts that it sufficiently rebutted the presumption by substantial evidence in that Claimant did not report the injury to his supervisor or treating physician and Claimant had a long history of back problems. Claimant's many inconsistent statements discredit him as a witness.

Alternatively, Employer contends that Claimant reached maximum medical improvement on the day he was released by is treating physician to return to full duty on October 10, 1999. As there is no showing of a change in Claimant's physical abilities, Employer asserts that Claimant has no economic disability. Employer also asserts that it offered Claimant a job at a different location but Claimant refused the offer. Nonetheless, because Claimant regularly violates his work restrictions, Employer asserts that his actual wage earning capacity has not changed since before his alleged accident/injury. Furthermore, Employer asserts that Claimant is not entitled to recover medical expenses because Claimant did not seek authorization before incurring those expenses.

B. Credibility

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98, 101(1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F. 2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, 88 S. Ct. 1140, 20 L. Ed. 2d 30 (1968).

Based upon inconsistent statements in the record, I find the Claimant to be an incredible witness. Specifically, Claimant made several different statements concerning whether or not an injury occurred. First, Claimant alleged that he was injured about eighteen hours into a forty-two hour work period. (Tr. 47). After the alleged injury, Claimant continued to work, and continued to finish out the rest of his hitch stating that work was a "little awkward." (Tr. 52). When he returned to Employer's facility, however, he

told his supervisor that he did not think he suffered an accident. (Tr. 87). Likewise, when Claimant filled out a history report for his treating physician, Dr. May, Claimant related that he was unsure if his condition was the result of a work injury, he stated that he had the same symptoms in 1995, and indicated that his present symptoms had appeared about one-and-a-half years ago. (EX 12, p. 14). On his short term disability application, Claimant stated that "there was not accident while working." (EX 8, p. 4). Only after Employer related that it would not rehire him did Claimant retain an attorney. Shortly, thereafter, Claimant clearly stated that his problems were work related. Even then Claimant described the alleged injury in different terms, telling the insurance adjuster that he felt a "twitch" in his back, and later testifying that the injury occurred when he felt a "popping" in his back. (Tr. 50; EX 17, p. 5).

Also impairing Claimant's credibility is the fact that Claimant misrepresented facts on his pre-employment physical for Employer when Claimant clearly indicated that he did not have any back problems within the last five years. (EX 13, p. 5). Similarly, Claimant misrepresented the facts to the insurance adjuster when he stated that he never had a previous work related injury or accident. (EX 17, p. 13). Also, Claimant neglected to relate that he had suffered a subsequent injury to his hip in August 1999 when he was disconnecting a trailer. (EX 12, p. 27). Also casting suspicion on Claimant's actions is the fact that Claimant never reported the injury to Employer or another company's supervisor during his hitch, and the fact that Dr. May had released Claimant to return to full duty until Claimant convinced him otherwise at a subsequent meeting. (Tr. 52, 102). Furthermore, Claimant flagrantly violates the restrictions that Dr. May set for him every time he exercises at the gym.[3] (Tr. 113-129). These factors, combined with my

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[3] The Dictionary of Occupational Titles defines work categories as follows:

> **M-Medium Work** - Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work.
>
> **H-Heavy Work** - Exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Medium Work.
>
> **V-Very Heavy Work** - Exerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Heavy Work.

DICTIONARY OF OCCUPATIONAL TITLES Appendix C (4th Ed., Rev. 1991).

Based on Claimant's work-out routine, he would appear to qualify for jobs in the Very Heavy

observation of the witness's demeanor at hearing, compel a finding that the Claimant is not a credible witness.

C. Causation

To prove entitlement to benefits, Claimant must show that he suffered a harm that caused by - or could have been caused by - his employment. *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336, 338 (1981). Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2000); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995); *Addison v. Ryan Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 101 (1986). To rebut the Section 20(a) presumption, the Employer must present substantial evidence that a claimant's condition is not caused by a work-related accident or that the work-related accident did not aggravate Claimant's underlying condition. *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998). Under the Administrative Procedures Act, a claimant has the ultimate burden of persuasion by a preponderance of the evidence. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281, 114 S. Ct. 2251, 129 L. Ed 2d. 221 (1994).

Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966); *Kubin*, 29 BRBS at 119. The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295, 297 (1990). All factual doubts must be resolved in favor of the claimant. *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998) (quoting *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991).

Work category.

C(1) Prima Facie Case

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act **it shall be presumed**, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a)(emphasis added).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between the work and the harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment.

C(1)(a) Existence of Physical Harm or Pain

Claimant has established that he suffers from a physical harm. Specifically, Claimant had persistent back pain rating as high as "6" on a 0-10 scale which prompted Dr. May to conduct numerous VAX-D treatments. (EX 12, p. 27). Dr. May diagnosed degenerative disc disease, degenerative joint disease and sciatica. (EX 5, p. 27; EX 12, p. 3). An x-ray film taken by the American Back Institute and read by Dr. Barczyk reveled degenerative changes at L5-S1 and L2-L3. X-rays also revealed pelvic un-leveling, and a moderate convexity of the lumbar spine, which led Dr. Barczyk to diagnose chronic sacroiliac sprain/strain and sacral segmental dysfunction. (EX 16, p. 12). X-rays taken by Dr. Benard in October 2001, revealed lumbar scoliosis, bilateral spondylitic defects at L5 with a very mild slip at L5-S1. (EX 11, p. 1). An October 31, 2001, MRI revealed degenerative disc disease. *Id*. Accordingly, Claimant suffers from some harm.

C(1)(b) Establishing that an Accident Occurred in the Course of Employment, or that Conditions Existed at Work, Which Could Have Caused the Harm or Pain

Uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that condition existed at work that could have caused the harm. *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976)(finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985)(ALJ)(finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record). For a traumatic injury case, the claimant must show a specific traumatic event, more than just working conditions that required repetitive bending, stooping, climbing, or crawling. *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5th Cir. 1997)(finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are treated as traumatic injuries); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2nd Cir. 1989)(finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease). Conditions that are due to congenital and degenerative factors do not constitute a compensable injury. *Lennon v,. Waterfront Transport*, 20 F.3d 658, 662 (5th Cir. 1994); *Director v. Bethlehem Steel Corp.*, 620 F.2d 60 (5th Cir. 1980). Thus, a claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

In *Bolden v. G.A.T.X. Terminals, Corp.*, 30 BRBS 71, 72-73 (1996), the Board affirmed a denial of benefits when the ALJ determined that the claimant was not a credible witness and negated the claimant's contentions that he suffered a work related accident. Specifically, the claimant related his injury to a specific traumatic event, but the ALJ noted: 1) the claimant was confused over the date of the incident; 2) a physician remarked that the claimant had experienced pain two weeks prior to the alleged accident; 3) neither the clamant nor his physician related the pain to the claimant's work during or soon after the alleged event occurred; and 4) the claimant failed to report the injury to his employer promptly. *Id*. at 72. Similarly, the ALJ discredited the testimony of the claimant's co-workers and wife because their statements concerning the claimant's physical condition did not establish the date of the alleged traumatic event. *Id*. Finally, the ALJ noted that no physician, outside of those who took the claimant's version of events at face value, could establish that a specific event cause the claimant's injuries. *Id*. at 72-73. Accordingly, the claimant in *Bolden* failed to establish the second prong of the *prima facie* case because he failed to establish that a traumatic event, or conditions that existed at work, could have caused his harm. *Id*. at 73.

Similar to *Bolden*, Claimant fails to establish that he suffered an accident that occurred in the course of his employment or that a condition existed at work which could have caused the harm or pain. As noted *supra*, I do not find Claimant to be a credible witness and his uncorroborated testimony alone is insufficient to establish a *prima facie* case. Specifically, Claimant failed to show a *prima facie* case because:

1) Claimant stated different dates when alleging that he suffered a work-related injury. Originally Claimant stated that no accident had occurred. (Tr. 87; EX 8, p. 4; EX 12, p. 14). After Claimant's attorney became involved, the date of the alleged accident shifted from July 22, 1999 in Employer's First Report of Injury, (CX 4) and in Employee's Claim for Compensation (EX 7) to July 21, 1999 in his statement to the insurance adjuster, (EX 17, p. 3), to July 20, or 21, 1999 in his medical history to Dr. Barczyk. (EX 16, p. 3).

2) Claimant remarked to Dr. May that he had been experiencing his symptoms for about a year-and-a half prior to his August 5, 1999, health history statement, and stated that he had the same symptoms in 1995. (EX 12, p. 14).

3) Neither Claimant nor Dr. May related the problem to Claimant's employment after the accident occurred. Dr. Barczyk related Claimant symptoms to his work place accident but only because he accepted the history Claimant gave to him without verification. (EX 6, p. 36).

4) Claimant failed to report the injury to Employer or another supervisor on the oil rig/platform after the accident occurred. Instead, Claimant waited until after his shift ended on July 27 or 28, 1999 to tell his supervisor that he had injured his back, and even then Claimant related that he did not think that his back condition was work related. (Tr. 52).

5) The testimony of Claimant's co-workers, neither of whom witnessed the alleged event, was not sufficient to establish that an event occurred or that conditions existed at work that could have caused the harm because they only established that Claimant appeared to be fatigued from working too hard. Neither person could remember the date of the accident. (Tr. 25, 33-34).

6) Claimant testified that he only pulled/strained a muscle at the time of the alleged accident, something which happened to him all the time at work. (Tr. 50).

7) After reviewing Claimant's x-rays, Dr. Bernard stated that the objective evidence was not consistent with what he would have expected from a traumatic injury. (EX 11, p. 5).

Accordingly, after discrediting Claimant's testimony, there is no credible evidence to substantiate that an event occurred, or conditions existed at work that could have caused Claimant's harm. There were no witnesses to the alleged accident, Claimant was unable to establish a precise date and time, Claimant

had the same symptoms prior to the alleged accident, no physician objectively related Claimant's harm to his injury, Claimant did not immediately report the injury, and Claimant continued to another twenty-four hours after the alleged injury (which allegedly occurred in the eighteenth hour) with only two hours of rest. Therefore, Claimant's petition for benefits under the Act is DENIED for a failure to show a *prima facie* case for compensation.

Nonetheless, should the Board determine that Claimant presented a *prima faice* case I will address the remaining issues dealing with causation.

V ALTERNATIVE FINDINGS

C(2) Rebutting the Section 20(a) Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc.*, 194 F.23d at 687-88 (citing, *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 690 (5th Cir. 1999)(stating that the hurdle is far lower than a "ruling out" standard).

Here, Employer presented substantial evidence to show that Claimant's injury was not work related. Specifically, Employer established that Claimant has a long history of low-back and hip pains prior to his alleged injury. (TR. 65; EX 12, p. 14; EX 15). A long history of back pain, combined with the fact that Claimant is not a credible witness, and the fact that there were no eye-witnesses to independently verify that and accident occurred, constitutes substantial evidence to rebut the Section 20(a) presumption of causation.

C(3) Causation Based on Record as a Whole

Once the employer offers sufficient evidence to rebut the Section 20(a) presumption, the claimant must establish causation based on the record as a whole. *Brown*, 194 F.3d at 5. If, based on the record, the evidence is evenly balanced, then the employer must prevail. *Id*. *See also Greenwich Colleries*, 512 U.S. at 281.

C(3)(a) Claimant Pre-Injury Impairments

Claimant, testified that he had prior back problems. (Tr. 65). While working for Ingram Cactus in the late 1980s, Claimant had his back x-rayed, which came back as a "Class 4 back." (Tr. 75). Also, while working at the Sheriff's Office, Claimant complained to Dr. Bryant in July 1992, that he had pain in his upper back and neck that was due to a spinal subluxation. (EX 15, p. 2). After initially successful treatment, Dr. Bryant recommended continued spinal adjustments to help reduce Claimant's scoliosis. *Id*.

Also while working for the Sheriff's Office, Claimant was struck by a car while in pursuit of a suspect. (Tr. 65). Claimant underwent treatment with Dr. Bryant on April 16, 1995, and his chief complaint was low back and left side pain with restricted lumbar dorsal roms. (Tr. 65; EX 15, p. 7). Orthopedic testing revealed a lumbar sprain/strain syndrome with myospasm and restricted roms. *Id*. Claimant also related on April 25, 1995, that he had been experiencing numbness in both hands and both small fingers over the past year. (EX 15, p. 11). Dr. Bryant treated Claimant for active symptoms until June 12, 1995, and discharged Claimant on July 14, 1995. *Id*. at 20.

C(3)(b) Claimant's Post-Injury Impairments

After his work-related injury, Claimant underwent treatment with Dr. May at the American Back Institute. (EX 12). On August 5, 1999, Dr. May diagnosed degenerative disc disease and degenerative joint disease. (EX 12, p. 3). Dr. May also related that a patient with degenerative back disease , who engaged in heavy manual labor, first gets muscle fatigue, and as those muscles fatigue, the muscles of the supporting tissue help out to relieve pressure on the spine. (EX 5, p. 27). As those muscles become fatigued, the discs in the spine end up taking a greater weight and the pressure can lead to an acceleration of the degenerative process. *Id*. Dr. May also diagnosed sciatica, which occurs when the disc degenerates to such an extent that the nerve root exits. *Id*.

Dr. Barczyk also noticed degenerative changes in Claimants lumbar spine and diagnosed sacroiliac sprain/strain and sacral segmental dysfunction. (EX 16, p. 12). Dr. Benard, interpreted films of Claimant's

back as evidencing mild idiopathic lumbar scoliosis, bilateral spondylitic defect at L5 and an very mild slip at L5-S1 which was not present on the later MRI scan. (EX 11, p. 1, 5).

C(3)(c) Comparing Claimant's Pre and Post-Injury Status

Viewing the medical evidence concerning Claimant's low back and left hip reveals that Claimant has had long standing problems with those two areas. In 1995 Claimant related that he had the same symptoms as he presently complains about. (EX 12, p. 14). All of Claimant's post-injury physicians diagnosed *degenerative* or *developmental* changes in Claimant's back, which are not traumatic injuries under the Act, and in the absence of a showing that they are due to an occupational disease, are not compensable.[4] Indeed, Dr. Bernard stated that the objective evidence did not support a conclusion that Claimant suffered from a traumatic injury. (EX 11, p. 5). Even if Claimant's condition was not degenerative, I find no credible evidence directly linking his present condition with a specific event in July 1999. Therefore, based on the record as a whole, I find that Claimant's employment did not cause, or aggravate in a traumatic way, Claimant's degenerative disc disease, degenerative joint disease, scoliosis, pelvic un-leveling, spondylitic defect at L5, sacroiliac sprain/strain, sacral segmental dysfunction or sciatica. Accordingly, Claimant's petition for benefits under the Act is DENIED.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find that Claimant has not established that an event or condition at work caused his harm. Therefore, Claimant's petition for benefits under the Act is DENIED.

A

CLEMENT J. KENNINGTON

Administrative Law Judge

[4] *See* Lennon v,. Waterfront Transport, 20 F.3d 658, 662 (5th Cir. 1994); Director v. Bethlehem Steel Corp., 620 F.2d 60 (5th Cir. 1980).